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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL PALMERO, Defendant and Appellant.	E053941 (Super.Ct.No. FWV1002832) OPINION

APPEAL from the Superior Court of San Bernardino County. Jon D. Ferguson, Judge. Affirmed as modified.

Johanna R. Pirko, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, Vincent P. LaPietra and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Miguel Palmero guilty of transporting a controlled substance (Health & Saf. Code, § 11379, subd. (a)), selling a controlled substance[1] (Health & Saf. Code, § 11379, subd. (a)), and possessing a controlled substance for sale (Health & Saf. Code, § 11378). The trial court found true the allegation defendant suffered a prior strike conviction. (Pen. Code, § 1170.12.) The trial court also found true the allegation defendant suffered two prior convictions involving controlled substances. (Health & Saf. Code, § 11370.2, subd. (c).) The trial court sentenced defendant to prison for a term of 14 years.

Defendant raises four issues on appeal. First, defendant asserts the trial court erred by denying his motion to suppress evidence because law enforcement officers did not have a reasonable suspicion defendant committed a crime. Second, defendant contends the trial court erred by not adequately inquiring into whether good cause existed for dismissing a juror. Third, defendant asserts the trial court failed to instruct the jury on the elements of the offense of selling a controlled substance (Health & Saf. Code, § 11379, subd. (a)).[2] Fourth, defendant contends substantial evidence does not support his conviction for transporting a controlled substance (§ 11379, subd. (a)).

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[1] The exact label assigned to this conviction will be discussed in detail *post*.

[2] All further statutory references are to the Health and Safety Code unless otherwise indicated.

FACTUAL AND PROCEDURAL HISTORY

On November 11, 2010, San Bernardino County Sheriff's Deputy Scalise was working on a narcotics investigation. Specifically, Deputy Scalise was focused on an individual named Clifford Stetler (Stetler). Earlier in the day, Deputy Scalise received information that Stetler was selling drugs at a Storage Max facility in the City of Montclair. Deputy Scalise went to the Storage Max and then proceeded to follow Stetler, who was using a bicycle for transportation. Deputy Scalise was in plain clothes and driving an undercover vehicle. Two members of Deputy Scalise's team, Deputies Dean and Rayenhartz, were in uniform and remained in radio and cell phone contact with Deputy Scalise.

Deputy Scalise followed Stetler as he travelled to a parking lot in a Petco shopping center. Stetler stopped "[d]irectly in front of a driver's side door of a silver Honda Civic," which was parked in a parking stall. Deputy Scalise was approximately 30 feet from the Civic when Stetler stopped. Deputy Scalise saw one person inside the Civic, sitting in the driver's seat. Defendant was the person inside the Civic. Stetler and defendant spoke to one another while Stetler was approximately three to four feet away from the car door. Stetler then moved closer to the car door.

Stetler removed cash from his front right pocket and handed it to defendant. Defendant took the money. Defendant "handed something back" to Stetler; however, the deputy could not see exactly what defendant handed Stetler. Deputy Scalise "called in" Deputies Dean and Rayenhartz. As the two deputies approached the Civic, Stetler looked

up at the patrol vehicle, opened his hand and tossed an object into the Civic. Deputy Scalise approached the Civic after the two other deputies had arrived.

Deputy Scalise walked to the driver's side of the Civic and saw a yellow balloon tied in a knot resting in the front passenger seat and "a large sum of cash in the center console area between the driver and passenger seats." Deputy Scalise also saw cash on the floorboard of the car. When the car door opened, Deputy Scalise saw more money "in the door" of the car as well. Deputy Scalise explained that drugs are sometimes packaged in balloons so they can be swallowed to hide evidence, and also to provide "[e]ase of transportation." The keys to the Civic were found in the car's ignition. Keys to defendant's residence were on the key ring.

Deputy Rayenhartz asked defendant to exit the car. Deputy Rayenhartz then searched defendant. The deputy found a wallet in defendant's right front pants pocket, which contained $2,500. Deputy Dean explained various ways methamphetamine is packaged, one of which is inside balloons. After defendant exited the car, Deputy Dean also saw the yellow balloon tied in a knot inside the car, although he recalled it being in the driver's seat.

Inside the yellow balloon, Deputy Dean found a white plastic bag, similar to a small cut-out portion of a grocery bag. Inside the white bag the deputy found a white crystalline substance that he suspected to be methamphetamine. Deputy Dean calculated the cash found in the car and on defendant's person, and found it amounted to more than $3,000. Deputy Dean found defendant's cell phone inside the car. Stetler's phone number was programmed into defendant's phone. Deputy Dean found a phone call had

taken place between defendant and Stetler approximately 30 minutes before they met in the Petco parking lot. The substance in the yellow balloon tested positive for methamphetamine, and weighed 0.29 grams without the packaging.

During the investigation, Deputy Dean located defendant's residence in the City of Ontario. In defendant's bedroom, the deputy found over 150 balloons in multiple colors, including the same shade of yellow as that found in the Civic. The deputy also found a functioning digital scale that appeared to be marked with methamphetamine residue. Additionally, the deputy found cut and torn pieces of plastic that appeared to come from a grocery bag. The pieces of plastic were the same type as that found inside the yellow balloon in the Civic. Also in defendant's residence, Deputy Dean found $7,770 in cash, in multiple denominations. No methamphetamine, other than the suspected residue, was found inside defendant's home. Based upon the investigation, as well as training and experience, Deputy Dean believed defendant possessed methamphetamine for the purpose of selling it.

DISCUSSION

A. SUPPRESSION

1. *FACTS*

On January 28, 2011, defendant filed a motion to suppress the evidence found in the Civic, because the deputies did not have reasonable suspicion to believe a crime occurred. (Pen. Code, § 1538.5.) Defendant argued Deputy Scalise only had a hunch a drug transaction occurred, because the deputy could not see what defendant handed to Stetler. Defendant argued the search of his vehicle was illegal because it was not

supported by probable cause. Further, defendant asserted the permission he gave for the deputies to search his person and vehicle was coerced by the deputies' unlawful display of authority. Further, defendant asserted the search of his home was illegal because the deputies used the key taken from his car to search his home without a warrant. Defendant argued all the evidence found at his home should also be suppressed.

The People opposed defendant's motion to suppress evidence. The People argued reasonable suspicion of a crime was supported by the believed hand-to-hand sale witnessed by Deputy Scalise, the balloon lying in plain sight in the car, and the large amount of cash in plain sight in the car. In regard to defendant's residence, the People asserted exigent circumstances existed. While the deputies were in the Petco parking lot with defendant, a Petco employee informed them a woman was inside the store "'freaking out.'" The woman identified herself as defendant's girlfriend, Magdalena. The employee told the deputies Magdalena had been watching the deputies and defendant from inside the store and had been on her cell phone "the entire time, approximately 45 minutes." The deputies found documents in defendant's car indicating he shared a residence with Magdalena. The People argued exigent circumstances existed to enter defendant's home because Magdalena had been on the telephone for 45 minutes during the investigation, and could have been arranging for the destruction of evidence inside the residence. The People argued the deputies needed to secure the residence while they waited for a warrant.

On February 7, 2011, defendant filed a supplemental motion to quash and traverse the warrant. In the supplemental motion, defendant explained that deputies used

defendant's key to enter defendant's residence. Once inside, the deputies saw balloons in a closet and balloons on the ground. The deputies requested "a night serviceable search warrant" to avoid the destruction of evidence. A warrant was issued by a judge at 10:30 p.m. on the night of the of the parking lot incident, November 11. More evidence was recovered after the warrant was executed, such as sea salt and bottles of amino acids.

Defendant argued the warrant should be quashed because in Deputies Dean's and Scalise's reports, they did not mention that Magdalena was making telephone calls, so Deputy Dean's statement for the warrant that Magdalena was making telephone calls was false. Defendant further argued it was merely speculation that Magdalena was arranging for the destruction of evidence, and therefore there were not exigent circumstances.

The trial court held a hearing on defendant's original motion on February 10, 2011. The hearing only addressed the portion of the search prior to the search warrant. Deputy Scalise testified at the hearing. Deputy Scalise explained that he followed Stetler to the Petco parking lot. The deputy saw Stetler hand cash to defendant, and defendant hand an object to Stetler. Based on Deputy Scalise's training and experience, he believed he witnessed an illegal drug sale. Deputy Scalise stated he approached the driver's door of defendant's car and saw a large amount of cash in the center console area, and a yellow balloon tied in a knot. The cash and balloon were in plain sight. The contents of the balloon were consistent with the methamphetamine the deputy had seen in the past. Deputy Scalise further testified that during the investigation, Magdalena exited the Petco while talking on her cell phone. Deputy Scalise spoke to Magdalena to help determine where defendant lived.

Deputy Dean also testified at the hearing. Deputy Dean explained defendant's vehicle was searched because Deputy Dean saw a yellow balloon tied in a knot inside the vehicle, and the deputy believed it contained illegal narcotics. A photograph at the hearing showed a yellow balloon tied in a knot on the driver's seat of the vehicle, and a roll of cash between the driver's seat and the center console. Based on training and experience, Deputy Dean believed the substance inside the balloon was methamphetamine.

When Deputy Dean was speaking to Stetler, Stetler admitted he was in the parking lot to purchase methamphetamine from defendant. Deputy Dean felt the need to search defendant's residence, because his training and experience has taught him people involved in illegal drug sales often have larger quantities of drugs at their homes. Deputy Dean felt defendant's residence needed to be immediately secured due to Magdalena observing the investigation and arrest. Also, documents in the car reflected Magdalena lived at the residence with defendant. The deputies went to defendant's residence at 8:19 p.m. Deputy Dean asked defendant for permission to search the residence, but defendant said he did not live at the residence. Deputy Dean entered the apartment without a warrant. While "clearing" the residence, Deputy Dean saw balloons in several places.

Defendant argued the search of defendant's residence was illegal because the deputies were only speculating that evidence might be destroyed. Also, if the deputies feared destruction of evidence, then they should not have waited two hours to enter defendant's residence. Defendant argued the deputies had "ample" time to secure a

search warrant, but chose to enter the apartment without a warrant. The warrant was signed by the judge at 10:26 p.m.

The trial court disagreed that the deputies were speculating about the possible destruction of evidence. The trial court believed Magdalena's presence and connection with the residence provided a nexus for the search. The trial court explained, "But if you have a person connected with drugs by name and you see that person on the cell phone wherein the circumstances they have—the officers had it this time, the officers had it this time. Do you think it's so unreasonable, based on their training and experience, that that person on the phone might not be calling that residence to tell them, hey—because they know as well as we do discussing this, hey, I think the cops may come?"

Defendant argued there was no way to know what Magdalena was discussing on the telephone—she could have been trying to find a ride or bail money for defendant. The trial court explained Magdalena may have been having an innocent conversation, but it would be reasonable to interpret the conversation as relating to the destruction of evidence. However, the trial court did have a concern about the two-hour gap between the arrival at defendant's residence and obtaining the search warrant. The trial court explained, "While on the one hand they had—they seem to have facts that justify the urgency, their actions don't seem to indicate urgency." The trial court ruled the search of the vehicle was proper because the evidence reflected sufficient probable cause, but the trial court reserved its ruling on the search of defendant's residence. The trial court asked the parties to provide supplemental briefing on the definition of the word "promptly,"

because the trial court believed there were exigent circumstances supporting the search of the residence if the search were promptly conducted.

The parties submitted cases to the trial court, and the hearing resumed one week later. The trial court concluded, in the cases submitted by the parties, the officers all had reasons to justify their delays in making warrantless entries. The trial court concluded more testimony would be needed to decide the motion, because it was unclear what caused the deputies' delay in this case. Defendant objected to the court taking more evidence, arguing the prosecution did not meet its burden during the initial presentation of evidence. The trial court concluded it did not have enough information to rule on the motion, and the prosecution was not being given a particular advantage.

The prosecutor asked the trial court to strike from the probable cause declaration the items the deputies saw when they entered defendant's apartment without a warrant. The prosecutor asserted the probable cause declaration would still support the issuing of a warrant without that information, and then the items could be brought in through the theory of inevitable discovery. The prosecutor suggested setting aside the motion to suppress and moving onto the motion to traverse, so as to possibly prevent the need to take additional testimony. The trial court agreed and moved onto the motion to traverse.

For the motion to traverse and quash the warrant, defendant argued the deputies were only speculating Magdalena was discussing destruction of evidence while on the phone. Further, the deputies' reports did not reflect Magdalena was making telephone calls, so the deputies were lying in the probable cause statement. The trial court stated inconsistencies in the reports and testimonies did not mean the deputies were lying. The

trial court found the face of the affidavit supported the signing of the warrant, so the motion to quash failed. The trial court also found defendant raised good points for the motion to traverse, but believed the points were better for cross-examination, and not successful for a motion to traverse. The trial court denied the motions to quash and traverse. The trial court found it still needed evidence about the deputies' timeline in order to rule on the motion to suppress.

Deputy Dean testified he did not realize there were exigent circumstances until he finished speaking with Magdalena. Deputy Dean arrived at the Petco parking lot at 6:45 p.m. The first witness interview began 20 to 30 minutes later. The Petco employee came out to the parking lot around 7:30 p.m. The search of defendant's car was completed at approximately 8:00 p.m. The deputies left the Petco parking lot at 8:19 p.m. and drove from Montclair to Ontario. Approximately 10 to 15 minutes later, they arrived at defendant's address, but they did not know which apartment was his. There were three units at the address. The deputies started with Unit C and spoke to the people at that apartment. Deputy Dean started with Unit C because it was the furthest back, and another deputy was watching the front apartments. Defendant's keys opened Unit A. It took Deputy Dean "[l]ess than five minutes" to go from Unit C to Unit A. After the residence was secured, Deputy Dean discovered a car registered to defendant was parked closest to Unit A.

Defendant argued that if the deputies did not arrive at defendant's residence until approximately 8:30 p.m., then they had sufficient time to secure a warrant prior to entering defendant's home. The trial court found the deputies' timeline was justified, i.e.,

the deputies did not unnecessarily delay entering defendant's house and were conducting the investigation the whole time. The trial court explained that reaching a judge to secure a warrant "is a time-consuming situation." The trial court concluded exigent circumstances supported entering the apartment, based upon the issues with Magdalena. The trial court denied defendant's motion to suppress.

2. *ANALYSIS*

Defendant contends the trial court erred by denying his motion to suppress the evidence against him, because the deputies did not have a reasonable suspicion defendant committed a crime. (Pen. Code, § 1538.5.) We disagree.

"The standard of review for the denial of a motion to suppress is well settled. 'We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]' [Citation.]" (*People v. Cantor* (2007) 149 Cal.App.4th 961, 965.)

"'"[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and the same involvement by the person in question.

The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. [Citation.]"' [Citation.]" (*People v. Pitts* (2004) 117 Cal.App.4th 881, 885.) A criminal defendant may move to suppress evidence that was obtained in violation of this rule. (Pen. Code, § 1538.5, subd. (a)(1)(A).)[3]

In *People v. Butler* (2003) 111 Cal.App.4th 150, a Los Angeles County Deputy Sheriff received an anonymous telephone call from a woman. The woman believed drugs were being sold from a gray Ford Explorer parked across the street from a particular address. The deputy told other deputies to "'be on the lookout'" for drug sales in the area. (*Id.* at p. 153.) A second deputy, Deputy Hayes, went to the address and saw a gray Ford Explorer. Deputy Hayes saw a woman standing at the Explorer's driver's door, and the driver's window was down. The defendant was seated in the driver's seat. Deputy Hayes saw the defendant "hand something to the woman standing outside," and then "place something else in the hand of the woman outside his door." Deputy Hayes knew the area to be one of high crime. Deputy Hayes approached the driver's door of the Explorer, and the woman standing outside the door walked away toward a market. (*Ibid.*) During the driver's arrest a glass pipe was found. (*Id.* at p. 155.)

The defendant filed a motion to suppress. (*People v. Butler*, *supra*, 111 Cal.App.4th at p. 155.) The trial court found a reasonable suspicion of a crime having

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[3] For the sake of judicial efficiency, we will assume defendant was detained at the time the searches were conducted.

occurred was supported by the anonymous tip, combined with the deputy witnessing a hand-to-hand-exchange, the fact it was nighttime, and it was a high-crime area. (*Id.* at pp. 158-159.) The appellate court concluded the anonymous tip, the Explorer matching the anonymous tip, and the apparent drug transaction observed by Deputy Hayes was sufficient to justify a temporary detention. (*Id.* at pp. 161-162.)

In the instant case, Deputy Scalise had received information that Stetler was selling methamphetamine. Deputy Scalise saw Stetler leave his residence and travel to a Petco parking lot at approximately 6:45 p.m. Stetler stopped next to defendant's vehicle. Deputy Scalise saw Stetler hand defendant cash, and then saw defendant hand an object to Stetler. Deputy Scalise had previously observed hand-to-hand narcotics sales, and he believed Stetler and defendant were engaged in an illegal drug sale. As Deputy Scalise approached defendant's vehicle, defendant was seated in the driver's seat. While standing outside the vehicle, Deputy Scalise saw a large amount of cash in the center console and a yellow balloon tied in a knot "sitting on the seat." The balloon and cash were in plain sight.

Given the information Deputy Scalise received about Stetler being involved in drug sales, the hand-to-hand exchange the deputy observed in the parking lot, the deputy's experience observing hand-to-hand drug sales, and the cash and balloon that were plainly visible upon approaching defendant's car, we conclude the deputies had reasonable suspicion to believe defendant was involved in a drug sales offense. The totality of the circumstances was suspicious and would cause any reasonable law

enforcement officer to suspect the same criminal activity and the same involvement. Thus, we conclude the trial court did not err.

Defendant asserts it was not reasonable to suspect he was involved in criminal activity because Deputy Scalise did not know how much money was exchanged or what object defendant handed to Stetler. While Deputy Scalise did not have a detailed description of the objects being exchanged, he was able to see Stetler give cash to defendant. Based upon the parking lot environment, the informer's tip, and the deputy's past experience with hand-to-hand sales, it was reasonable for the deputy to suspect criminal activity without knowing the exact amount of money involved or the exact object being passed from defendant to Stetler. Thus, we are not persuaded by defendant's argument.

Next, defendant notes it was dark in the parking lot, and it is unclear how far away the deputy was from defendant when he observed the transaction. We do not find defendant's argument to be persuasive because Deputy Scalise was close enough, and had enough light to see that Stetler handed cash to defendant.

Defendant asserts Deputy Dean did not see the cash or balloon until after defendant exited the vehicle and was detained, so therefore the cash and balloon should not be used to determine if the deputies had a reasonable suspicion of criminal activity. We do not find defendant's argument to be persuasive because Deputy Scalise testified that he saw the cash and balloon in plain sight while defendant was seated in his vehicle. Deputy Scalise explained that Deputy Dean approached Stetler while Deputy Scalise

approached defendant. Thus, it is reasonable that Deputy Scalise saw the cash and balloon before Deputy Dean.

B. JUROR NO. 7

1. *FACTS*

On the second day of jury deliberations, Juror No. 10 sent a note to the trial judge. The note read, "I jour (*sic*) #10 feel jour #7 in finding the verdict is not basing the decision by the facts, evidence [and] most of all law but by [his/her] own emotional feelings." The trial court and trial attorneys had a self-described "sort of discussion off the record sort of brain storming some suggestions, as far as how to handle" the note from Juror No. 10.

On the record, the trial court made the following comments: "At this point, she is not asking [a] question that requires response. She is not indicating that all of the jurors agreed with her or that it is causing a mistrial. [¶] She's raising that as individually she feels juror number seven is [not] basing the decision on the factors. She does not state that juror number seven is refusing to deliberate, or is stating an intent to disregard the law or is bringing in other outside information that would be misconduct. She's stating she feels that and she indicates that it's she [who] personally . . . feels that. [¶] I'm not inclined at this point to send in a further instruction since she appears to be acting alone. I don't know that it would be proper to bring her in and question her further at this point since bringing her out may affect the other acts of the other jurors. [¶] At this point, as I indicated to counsel, I'm inclined to not take any further action."

The trial court asked defendant's trial counsel and the prosecutor if they wanted the court to take any further action. Both attorneys stated the court did not need to take any further action. The trial court's discussion of Juror No. 10's note began at 2:18 p.m. Eleven minutes later, at 2:29 p.m., the jury advised the trial court that it reached a verdict.

2. *ANALYSIS*

Defendant contends the trial court erred by not inquiring further into Juror No. 7's conduct when put on notice that there may have been good cause to dismiss the juror. We disagree.

"'"[O]nce a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty 'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged."' [Citations.]" [¶] 'But not every incident involving a juror's conduct requires or warrants further investigation. "The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court."' [Citation.] '"[A] hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case."' [Citation.]" (*People v. Martinez* (2010) 47 Cal.4th 911, 941-942.)

Determining whether a juror is refusing to deliberate or simply disagreeing with the majority of the jurors is "difficult for jurors who, confident of their own good faith and understanding of the evidence and the court's instructions on the law, mistakenly may believe that those individuals who steadfastly disagree with them are refusing to

deliberate or are intentionally disregarding the law." (*People v. Engelman* (2002) 28 Cal.4th 436, 446.) Jurors may become harsh, heated, and emotional during deliberations, but "in the interest of free expression in the jury room, such expressions normally should not draw the court into intrusive inquiries. [Citations.]" (*Ibid*.)

Our Supreme Court has concluded, "It is not always easy for a juror to articulate the exact basis for disagreement after a complicated trial, nor is it necessary that a juror do so. As [our Supreme Court has] stated, it is not required that jurors deliberate well or skillfully. [Citation.]" (*People v. Engelman*, *supra*, 28 Cal.4th at p. 446.) We review a trial court's decision regarding investigating juror misconduct for an abuse of discretion. (*People v. Allen* (2011) 53 Cal.4th 60, 70.)

Juror No. 10's note to the trial court was sent by an individual expressing her own feelings about Juror No. 7's ability to deliberate. There did not appear to be other jurors supporting Juror No. 10's assessment of the situation. The note reflected only that Juror No. 10 felt Juror No. 7 was being too emotional, and not using the facts and law in reaching his/her findings. As explained *ante*, jurors can become emotional during deliberations. A display of emotions does not support a judicial inquiry into the deliberation process. (*People v. Engelman*, *supra*, 28 Cal.4th at p. 446.) The trial court could reasonably interpret Juror No. 10's note as taking issue with Juror No. 7's emotional display. As a result, it was reasonable for the trial court to not inquire further into Juror No. 7's conduct, because the note could reasonably be interpreted as not alleging misconduct.

C. JURY INSTRUCTION

1. *FACTS*

Section 11379, subdivision (a), provides in relevant part: "[E]very person who transports, imports into this state, *sells*, furnishes, administers, or gives away, or *offers* to transport, import into this state, *sell*, furnish, administer, or give away, or attempts to import into this state or transport any controlled substance . . . shall be punished by imprisonment." (Italics added.)

An amended information charged defendant as follows: "On or about November 11, 2010, in the above named judicial district, the crime SALE OF A CONTROLLED SUBSTANCE, in violation of HEALTH AND SAFETY CODE SECTION 11379(a), a felony, was committed by [defendant], who did unlawfully transport, import into the State of California, sell, furnish, administer, and give away, and offer to transport, import into the State of California, sell, furnish, administer, and give away, and attempt to import into the State of California and transport a controlled substance, to wit, Methamphetamine."

Off the record, the trial court and trial attorneys discussed jury instructions. On the record, the trial court asked the trial attorneys if they were requesting any instructions that had not been provided. Defendant's trial counsel said, "I think the offer for sale would be for possession for sale, so I believe it should be one count." The trial court clarified that defense counsel believed defendant could not be convicted of both selling a controlled substance (§ 11379, subd. (a)), and possessing a controlled substance for sale

(§ 11378). The trial court instructed the jury on both offenses because it did not believe there was "a risk of confusing the jury if they're given the options on both."

During closing arguments, the prosecutor argued, "When you add all of that together, you can only come up with one conclusion, one reasonable conclusion, which is the defendant is guilty of possession for sale[,] transport for sales[,] and *offer to sell* methamphetamine." (Italics added.) During defense counsel's closing arguments, she said, "The proof is not overwhelming that they can prove that [defendant] was there beyond a reasonable doubt to *offer to sale* [*sic*], to transport[,] or to possess for sale."

The trial court instructed the jury with CALCRIM No. 2301, "Offering to Sell a Controlled Substance": "The defendant is charged in Count 1 with offering to sell methamphetamine, a controlled substance. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant offered to sell methamphetamine, a controlled substance; [¶] AND [¶] 2. When the defendant made the offer, he intended to sell the controlled substance. *Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value. [¶] The People do not need to prove that the defendant actually possessed the controlled substance."

The jury's verdict form for Count 1 provided: "We, the jury in the above-entitled action, find the defendant, MIGUEL PALMERO, GUILTY of the crime of SALE OF A CONTROLLED SUBSTANCE, as charged in the Information, as to Count I." The abstract of judgment lists defendant's offense in Count 1 as "sale of [a] controlled substan[ce]."

2. *ANALYSIS*

Defendant contends his conviction for sale of a controlled substance (§ 11379, subd. (a)) must be reversed because the jury was not instructed on the offense; rather, the jury was instructed on the offense of *offering* to sell a controlled substance (CALCRIM No. 2301). We disagree, but conclude the abstract of judgment must be corrected.

The elements for selling a controlled substance are (1) defendant sold a controlled substance; (2) defendant knew of the substance's presence; (3) defendant knew the substance character was that of a controlled substance; and (4) the substance actually was a controlled substance. (CALCRIM No. 2300.) The elements for *offering* to sell a controlled substance are (1) defendant offered to sell a controlled substance; and (2) at the time of the offer, the defendant intended to sell the controlled substance. (CALCRIM No. 2301.)

"The trial court must instruct even without request on the general principles of law relevant to and governing the case. [Citation.] That obligation includes instructions on all of the elements of a charged offense." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) However, """'A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court.' [Citations.]" [Citations.] "The form of a verdict is immaterial provided the intention to convict of the crime charged is unmistakably expressed. [Citation.]" [Citation.]' [Citation.]" (*People v. Camacho* (2009) 171 Cal.App.4th 1269, 1272.) A verdict is sufficient if the jury finds the defendant guilty by reference to a specific count contained in the information. (*Id.* at p. 1273.)

In the instant case, the verdict form reflects the jury found defendant "guilty of the crime of sale of a controlled substance, as charged in the Information, in Count I." The amended information charged defendant with all the various means of violating section 11379, subdivision (a), including selling a controlled substance and offering to sell a controlled substance. The jury was instructed on offering to sell a controlled substance, and the trial attorneys argued about offering to sell a controlled substance. Thus, the error at issue is that the verdict form reflects "sale of a controlled substance" rather than "offering to sell a controlled substance."

Since the verdict form referred back to the information which had the correct crime—offering to sell—and the jury was instructed on the offense of offering to sell, the error appears to be one only of labeling the offense on the verdict form. The jury had the correct instructions for transporting and possession, so it would have associated the "offering to sell" instructions with the Count 1 verdict form. As a result of the foregoing, we conclude the intention of the jury to convict of the "offering to sell" crime is unmistakably expressed. As a result, the abstract of judgment must be corrected to reflect defendant was convicted of offering to sell a controlled substance, as opposed to selling a controlled substance.

Defendant asserts his conviction for Count 1 must be reversed because the jury was never instructed on the offense of selling a controlled substance—the offense listed on the verdict form. We agree the jury was not instructed on the offense of selling a controlled substance; however, the verdict form referred back to the information, which included the offense of offering to sell a controlled substance. Thus, in reading the

verdict form, amended information, and "offer to sell" jury instruction, it can be determined the jury convicted defendant of offering to sell a controlled substance. As a result, we conclude the form of the verdict is immaterial.

Next, defendant asserts this court cannot cure the jury instruction error by amending the abstract of judgment to reflect that a jury convicted defendant of offering to sell methamphetamine. Defendant explains, "This suggested amendment only compounds the due process problems inherent in convicting appellant of a crime on which the jury was never instructed." As explained *ante*, the amended information included an allegation that defendant offered to sell methamphetamine. The trial court instructed the jury on the offense of offering to sell a controlled substance, and the trial attorneys argued about the offense of offering to sell a controlled substance. Thus, defendant was afforded due process. The verdict form incorrectly reflected "sale of a controlled substance," when it should have read "offered to sell a controlled substance." Given the certainty with which the jury's verdict can be deciphered, we conclude the abstract of judgment may be amended.

D. SUBSTANTIAL EVIDENCE

Defendant contends the evidence supporting his conviction for transporting a controlled substance (§ 11379, subd. (a)) does not meet the substantial evidence standard, because the record does not reflect defendant moved the methamphetamine from one place to another. We disagree.

"'Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal

character.' [Citation.] . . . 'The crux of the crime of transporting is movement of the contraband from one place to another.' [Citation.]" (*People v. LaCross* (2001) 91 Cal.App.4th 182, 185.)

"In reviewing the sufficiency of the evidence to support a conviction, we determine 'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.' [Citation.] Under [this] standard, we review the facts adduced at trial in the light most favorable to the judgment, drawing all inferences in support of the judgment . . . . [Citation.] The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusions. [Citation.]" (*People v. Misa* (2006) 140 Cal.App.4th 837, 842.)

The record reflects methamphetamine was found inside a yellow balloon in defendant's car. Defendant was in the driver's seat of the car. The car was in a parking lot. The car keys were in the car's ignition. The key ring also contained a key to defendant's residence. Inside defendant's residence there were numerous balloons, including yellow balloons that matched the balloon found inside defendant's car. A scale with suspected methamphetamine residue was found in defendant's residence, along with torn pieces of a plastic bag that matched the packaging of the methamphetamine in the car. Defendant's cell phone reflected that he spoke to Stetler approximately 30 minutes before the incident in the parking lot.

From the foregoing evidence, the jury could reasonably infer defendant and Stetler spoke on the phone about Stetler buying methamphetamine. Defendant drove to the parking lot to sell the methamphetamine to Stetler. The jury could infer the methamphetamine was transported from defendant's apartment, due to the matching balloons and torn plastic bag pieces. Thus, we conclude there is substantial evidence supporting the conviction for transporting a controlled substance, because a jury could reasonably infer defendant moved the methamphetamine from the apartment to the parking lot.

Defendant argues there is no evidence he moved the car and no evidence the methamphetamine was in the car prior to it being parked in the Petco parking lot. So, for example, defendant could have parked his car in the parking lot, obtained the methamphetamine from a passerby, and then resold it to Stetler without ever transporting the drug. Given the evidence that defendant's home held (1) a scale marked with suspected methamphetamine residue; (2) matching yellow balloons; and (3) matching plastic bag pieces, the jury could reasonably infer the methamphetamine was packaged for sale at defendant's residence and transported to the parking lot. Accordingly, we find defendant's argument to be unpersuasive.

DISPOSITION

On the abstract of judgment, the trial court is directed to change defendant's conviction on Count 1 from "Sale of Controlled Substan[ce]" to "Offering to Sell a Controlled Substance." The trial court is directed to prepare an amended abstract of

judgment and to forward it to the appropriate prison authorities. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.